rules, though not in terms, the second, by invoking as the controlling consideration the principle of equality of recovery among the stockholders, who in this respect, it says, are partners and nothing else. To this it was replied that the analogy is not demonstrative, inasmuch as it is not incompetent for one of two or more members of a partnership, especially where, as here, there are no general creditors, to withdraw with the consent of the others, receiving from them a certain amount in full accord and satisfaction, which settlement they would not later be allowed to open. The contention, however, did not prevail.

JOHNSON V. COMMONWEALTH.*

Supreme Court of Appeals: At Richmond.

March 17, 1904.

1. CRIMINAL LAW—*Indictment—Defective count—Demurrer—Verdict on other counts.*—Improperly overruling a demurrer to one count of an indictment is no ground for setting aside a verdict of guilty on other counts.

2. CRIMINAL LAW—*Verdict of guilty on some counts and silent as to others.*—A verdict of guilty as to certain counts of an indictment and which is silent as to other counts operates as an acquittal as to the latter, and it is unnecessary to enter any judgment of acquittal thereon.

3. FORGERY AND UTTERING—*One indictment—Separate counts—Separate verdicts.*—Forging and uttering a forged paper, knowing it to be forged, are separate and distinct offences, and may be charged in separate counts in the same indictment, and the jury may find a separate verdict of guilty upon each count, and fix the punishment for each offence separately, but the usual and better practice in such cases is to find a general verdict for the two cognate offences charged.

4. EVIDENCE—*Comparison of writing—Writings admitted merely for sake of comparison—Enlarged photographs.*—On an indictment for forgery it is not error to admit in evidence other writings of the prisoner shown to be genuine, and of the person whose writing is alleged to have been forged, also shown to be genuine, for the purpose of comparing by expert testimony the genuine handwritings with the handwriting of the paper alleged to have been forged. Nor is it error to admit in evidence enlarged photographs of these genuine writings for the purpose of facilitating comparison.

5. TRIAL—*What papers jury may take.*—Papers used in evidence before a jury may be carried from the bar by the jury under the express provisions of section 3388 of the Code.

6. INSTRUCTIONS—*Evidence to support.*—It is not error to refuse an instruction when there is no evidence tending to sustain the theory propounded by it.

7. CRIMINAL LAW—*Keeping jury together—When necessary.*—Where two separate

* Reported by M. P. Burks, State Reporter.

and distinct felonies are charged in separate counts of the same indictment, neither of which is punishable by imprisonment exceeding ten years, but the aggregate punishment for both of which may exceed that period, the jury must be kept together. *Keith, P.* and *Harrison, J.*, dissent on this point.

Error to a judgment of the Hustings Court of the City of Portsmouth sentencing the plaintiff in error to the penitentiary for four years upon conviction of forgery and uttering a forged will.

Reversed.

The opinion states the case:

Bland & Hope and *John W. Hopper,* for the plaintiff in error.

Attorney-General William A. Anderson, and *John S. Eggleston,* for the commonwealth.

HARRISON, J.

The accused was convicted of two offenses: (1) For forging and (2) for uttering a writing purporting to be the last will and testament of his deceased wife. In their verdict, the jury fixed the punishment at two years in the penitentiary for each offense.

The court is of opinion that there was no error in overruling the demurrer to the second and third counts of the indictment. If the first count was insufficient, as claimed—as to which we express no opinion—the failure to sustain the demurrer thereto resulted in no prejudice to the accused, as the jury only found him guilty upon the second and third counts. Nor was it necessary, when the jury found a verdict of guilty on the second and third counts, for the court to enter a judgment of acquittal upon the first count, for, when the verdict is silent as to any of the counts in the indictment, it operates an acquittal on those counts. *Hawley* v. *Commonwealth,* 75 Va. 850.

The court is further of opinion that it was not error to overrule the prisoner's motion in arrest of judgment. The ground of this motion was that the two counts—one for forging and the other for uttering the will—constituted one and the same offense, and that the verdict of guilty under each, fixing a punishment for the offense charged in each count, was convicting the prisoner twice for the same offense. This position is not tenable. The second count charged the prisoner with forging the will. The third count charged him with uttering the same. The statute (section 3737, Code

1887), prescribes as the penalty for forgery not less than two nor more than ten years in the penitentiary. The same section prescribes the same punishment for uttering a forged paper, knowing it to be forged. The verdict of the jury was as follows: "We, the jury, find the prisoner, C. C. Johnson, guilty as charged in the second count of this indictment, and fix his punishment thereon at two years in the penitentiary; and we, the jury, further find the prisoner, C. C. Johnson, guilty as charged in the third count of this indictment, and fix his punishment thereon at two years in the penitentiary." The judgment of the court was in accordance with the verdict, fixing the term of imprisonment at two years for the offense charged in the second count, and at two years for the offense charged in the third count; the latter punishment to commence at the termination of the term of confinement ascertained for the offense charged in the second count.

It is well settled that forging and uttering are separate and distinct offenses. Indeed, the statute makes them separate and distinct. It is equally well settled that each of these offenses may be charged in separate counts of the same indictment. It is also true that the jury may find the prisoner guilty upon each count, and ascertain the punishment for each offense separately. Wharton's Criminal Law (8th Ed.) section 910; *Speers* v. *Commonwealth,* 17 Gratt. 570.

While, in view of these authorities, we feel constrained to hold that in a case like this the jury may find the prisoner guilty upon each count, and ascertain the punishment separately, we are of opinion that the usual and better practice in such cases is to find a general verdict for the two cognate offenses charged.

The court is further of opinion that it was not error to admit as evidence other writings of the prisoner, proved to be genuine, and writings of his deceased wife, shown to be genuine, for the purpose of comparing by expert testimony the genuine handwritings with the handwriting of the alleged forged will. Nor was it error to admit enlarged photographs of these genuine writings for the purpose of facilitating such comparison. *Hanriot* v. *Sherwood,* 82 Va. 1; *United States* v. *Ortiz,* 176 U. S. 422, 20 Sup. Ct. 466, 44 L. Ed. 529. Nor was it error for the jury to take the genuine papers, thus introduced, to their room. After the papers had become part of the evidence in the case, no reason is perceived why they

should be excluded from the inspection of the jury. The Code of 1887 (section 3388) provides that "papers used in evidence, though not under seal, may be carried from the bar by the jury." See, also, *Hansbrough* v. *Stinnett,* 25 Gratt. 495, 505.

The court is further of opinion that it was not error to reject the instruction offered by the prisoner, and set forth in his bill of exceptions No. 6. Without expressing any opinion as to the accuracy of this instruction, as an abstract proposition of law, it is sufficient to say that there is not a word of testimony in the record tending to sustain the theory propounded by it.

The remaining assignment of error to be disposed of calls in question the action of the court in failing to have the jury kept together during the progress of the trial. Section 4025 of the Code of 1887, as amended by Acts 1893-94, p. 223, c. 211, provides that, "in any case of felony, when the punishment cannot be death or confinement in the penitentiary for more than ten years, the jury shall not be kept together, unless the court shall otherwise direct." I am inclined to the view that the statute contemplated the prosecution of a single felony in one indictment, but, where there are two separate and distinct felonies charged in separate counts of the same indictment, neither of which is punishable by imprisonment exceeding ten years, it was not intended that the jury should be kept together unless the court should so direct. In other words, the situation of the prisoner is the same that it would be if two indictments had been found, one for the forgery and the other for uttering, in neither of which cases could the punishment have exceeded ten years of imprisonment, and in neither of which would it have been necessary to keep the jury together. I am unable to perceive why the rule should be otherwise where the two felonies are charged in separate counts of the same indictment, and the jury finds a verdict upon each count, and ascertains the punishment for each offense separately. The majority of the court are, however, of opinion that, although each felony is charged in a separate count of the same indictment, and the jury finds a verdict upon each count, and fixes the punishment for each offense separately, still the one indictment makes but one case, in which it is possible for the jury to find upon the two counts, taken together, a greater punishment than ten years' imprisonment, and that the jury must therefore be kept together, the language of the statute being, "In

any case of felony," etc.; that, otherwise, in a single case, the prisoner would be subjected to the same mischief that the statute was intended to protect him against.

For the error, therefore, of not keeping the jury together during the progress of the trial, the judgment complained of must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

KEITH, P., concurs in the views expressed by *Harrison, J.*

Reversed.

LYNCHBURG COTTON MILLS v. STANLEY.*

Supreme Court of Appeals: At Richmond.

March 24, 1904.

Absent, *Cardwell,* J.

1. BILL OF EXCEPTION—*When perfected—Acts 1901, p. 186.*—Where an action is argued and submitted at one term of a court and decided at a later term the parties have, under Acts 1901, p. 186, thirty days after final judgment, or such time as the parties shall agree of record, within which to perfect exceptions duly taken to rulings during the trial. The object of the act was to extend the time within which bills of exception might be taken.

3. CONTRIBUTORY NEGLIGENCE—*Infants—Burden of proof.*—The law presumes that an infant between seven and fourteen years of age cannot be guilty of contributory negligence, and, in an action by such infant to recover for a personal injury inflicted by the alleged negligence of the defendant, the burden is on the defendant to overcome this presumption by proof of intelligence and capacity.

3. MASTER AND SERVANT—*Infant servant—Warning of dangers—Case at bar.*—A master who employs infants of tender years to work in places of danger is chargeable with the highest degree of responsibility for their care and protection. He should instruct them plainly and repeatedly as to the dangers to which they are subjected, and how to avoid them. He should be sure that they fully understand and appreciate his instructions and warnings, and in view of their proneness to forget, the instructions and warnings should be from time to time renewed. In the case at bar a boy under twelve years of age was employed in a mill where he had to pass frequently through a room filled with machinery, belts and pulleys, without any warning from the master as to dangers from the machinery, and how to avoid them, and, while playing with a belt on the moving machinery, received the injury complained of. The master was held liable.

* Reported by M. P. Burks, State Reporter.